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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

HAN REALTY CORPORATION, et al., Plaintiffs and Appellants, v. BANK OF AMERICA, et al., Defendants and Respondents.	B286628 (Los Angeles County Super. Ct. No. BC645276)

APPEAL from a Judgment of the Superior Court of Los Angeles County, John P. Doyle, Judge. Affirmed.

Nick A. Alden for Plaintiffs and Appellants.

Severson & Werson, Jan T. Chilton, Kerry W. Franich for Defendant and Respondent Bank of America, N.A.

Hahn Loeser & Parks, Michael J. Gleason, for Defendants and Respondents Fidelity National Title Group and Chicago Title Insurance Company.

Appellants David and Victoria Westley (the Westleys) sold their Encino property in a 2009 short sale to a third party. They allege Bank of America (BofA) agreed to reconvey its second trust deed on the property in connection with the short sale. Although the Westleys reacquired the property several months later from the purchaser at the short sale, they later lost the property in a foreclosure sale. The Westleys regained title to the property through litigation, but were unable to sell it because BofA's second trust deed remained on the property. The Westleys commenced this action against BofA, Fidelity National Title Group (Fidelity), and Chicago Title Insurance Company (Chicago Title). Their suit is based upon BofA's failure to reconvey, Fidelity's issuance of a title report showing the second trust deed did not encumber the property, and allegedly improper disbursements from the short sale escrow. The trial court sustained defendants' demurrers to the Westleys' First Amended Complaint (FAC) without leave to amend on statute of limitations grounds and entered judgment. We conclude appellants took the property subject to all encumbrances in 2009, and were on constructive notice of the second trust deed outside the statutory limitations period. Accordingly, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

We assume the following facts alleged in the FAC to be true when reviewing the judgment of dismissal following the demurrer. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) Because our factual statement is drawn from the facts alleged, clarity can be lacking. Therefore, we occasionally rely on the parties' briefs to fill in the blanks.

The Westleys owned real property at 4950 Woodley Avenue in Encino. Two trust deeds encumbered the property. The first

trust deed for $1 million was in favor of Metrocities Mortgage. The second trust deed was for $800,000 in favor of Bank of America's predecessor-in-interest, Countrywide Financial (Countrywide Lien).

1. The Short Sale of the Woodley Avenue Property to Han.

The Westleys hired defendant First Option Escrow to handle the escrow on the sale of the property. The First Amended Complaint alleges Chicago Title "was selected as a title company to issue the Title Insurance Policy for the Subject Property at the close of escrow, after all the liens had been paid off." It goes on to allege, "[a]t the close of escrow, [Chicago Title] issued a title insurance policy stating there were no liens on the Subject Property." The Chicago Title policy is attached to the FAC. The only listed insured is Bank of America, its successors and assigns (i.e., the Westleys were not named insureds). Contrary to the representations in the text of the First Amended Complaint, the policy itself does *not* state there were no liens on the property.

It is true the title policy does not identify the Countrywide Lien (or any other lien) in Schedule B, the list of exceptions from coverage and affirmative assurances, or in any other addendum. However, the policy's insuring clause states it is subject to the "terms, exclusions, and conditions set forth in the American Land Title Association Loan Policy (6-17-06), all of which are incorporated herein." But the ALTA policy is not attached to the Chicago Title policy, nor is it otherwise contained in the record. It therefore is impossible to tell, by reading the Chicago Title policy, whether any liens burdened the property.

In May 2009, the Westleys and BofA agreed to a short sale pursuant to which BofA would accept $3,000 as payment towards the second trust deed. Upon receipt of the funds, BofA would release the Countrywide Lien and charge off the remaining debit as a collectable balance. The Westleys accepted BofA's offer by sending a $3,000 check.

The short sale took place on May 19, 2009. Zhangiang Han (Han) purchased the property, financed with a new $1,040,000 loan from BofA. The FAC alleges "[i]t is common knowledge that Banks, including BofA, will not issue a new loan unless the previous loans were paid off." The FAC further alleges "[b]y issuing a new loan to HAN, BofA lulled the Westleys into a sense of security that the Countrywide Lien was paid off. This sense of security was reinforced by the fact that, since May of 2009, BofA never sent to the Westleys any demand for payment on the Countrywide loan. BofA never informed the Westleys that the $3,000 [was] not paid, pursuant to the Agreement of May 11, 2009." The Westleys further alleged they never received any requests for payment on the Countrywide Lien after the sale of the property to Han. The absence of requests "reinforced the Wesley's belief that Fidelity had paid BofA the $3,000 [out of escrow of the short sale] to satisfy the Countrywide Lien."

At the close of escrow on the short sale, Chicago Title issued a title insurance policy showing no liens on the property.

2. Han's Conveyance Back to the Westleys (Han Realty Corporation); Trustee's Sale.

Shortly after the short sale closed, Han reconveyed the property to the Westleys by gift deed dated July 14, 2009. The grantee on the deed, Han Realty Corporation, is an entity wholly-controlled by the Westleys. The Westleys agreed to the

reconveyance and assumption of the new BofA first trust deed based upon Chicago Title's insurance report received in connection with the short sale escrow.

On December 7, 2011, the trustee under the new first deed of trust recorded a notice of default, and on March 13, 2012, recorded a notice of trustee's sale.

To enjoin the trustee's sale, on April 3, 2012, Han Realty filed an action against BofA and the trustee under the trust deed and obtained a temporary restraining order stopping the sale (Han action).

However, the trustee sold the property for $785,000, in violation of the TRO, to defendant the Woodley Trust #4950, City Investment Capital (Woodley Trust).

On April 27, 2012, the trial court issued a preliminary injunction enjoining the sale. Nonetheless, the trustee executed and delivered a trustee's deed upon sale to Woodley Trust. Woodley Trust recorded the trustee's deed upon sale soon thereafter.

3. Woodley Action Against the Westleys (Han Realty).

Woodley Trust filed suit against Han Realty on August 13, 2012, for declaratory relief and quiet title (Woodley action). The trustee recorded a notice of rescission of the Woodley trustee's deed upon sale on August 20, 2012.

After four years of litigation, the trial court issued judgment in favor of Han Realty in the Woodley action. Pursuant to the judgment, the court found the notice of rescission restored record title to the subject property to its previous owner, Han Realty. The judgment further found "[t]his judgment is without prejudice to, and does not limit or diminish, any encumbrances and/or liens existing on the property as of April 3, 2012. The

judgment is also without prejudice to the rights of any lender or lenders relating to such liens and/or encumbrances, and it does not [affect] the validity or enforcement of any such encumbrances and/or liens."

4. The Westleys' Attempts to Sell the Property; Discovery that Countrywide Lien Still Encumbered the Property.

After judgment in the Woodley action, the Westleys attempted to sell the property. They allege this was the first time they discovered the Countrywide Lien was still on record.

Furthermore, in August 2016, BofA asserted it had no record of receiving the Westleys' $3,000 payment to extinguish the Countrywide Lien. However, the Westleys asserted Fidelity's disbursement list from the short sale escrow (produced to them for the first time in February 2017), showed Fidelity issued a check to BofA for $3,000 in May 2009. Fidelity's disbursement sheet also disclosed the issuance of $176,480.51 to First Option Escrow's principal Christopher Thompson. The Westleys asserted Thompson converted the funds to his own use.

5. Plaintiffs' First Amended Complaint; Demurrers of Bank of America, Fidelity and Chicago Title.

The FAC[1] alleged claims for (1) declaratory relief, (2) breach of fiduciary duties, (3) negligence, (4) breach of contract (against BofA), (5) breach of contract (against Fidelity), (6) cancellation of instrument, (7) violation of Business & Professions Code section 17200, (8) quiet title, and (9) conversion.

The Westleys principally alleged—as the basis for their claim BofA misled them—the Countrywide Lien had been extinguished in 2009. Notwithstanding this allegation, they

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[1] Plaintiffs' filed their initial complaint on December 29, 2016.

allege Chicago Title falsely issued a title policy in 2009 showing no liens on the property in connection with the short sale. As noted above, however, the policy does not reflect what liens, if any, affected title at that time. Moreover, the policy insured Han's lender, not the Westleys.

6. Defendants' Demurrer to FAC.

Defendants BofA, Fidelity and Chicago Title demurred to the FAC, principally asserting plaintiffs' claims were barred by the longest applicable statute of limitations of four years,[2] and the FAC failed to state any claims. Defendants asserted the claims accrued in 2009 in connection with reconveyance of the sale of the property to Han Realty. They further allege plaintiffs with reasonable diligence should have discovered both the Countrywide Lien still encumbered the property and the wrongful disbursement of funds to Thompson. BofA also asserted the Woodley action was res judicata with respect to plaintiffs' claims.

Plaintiffs responded the statutes of limitations did not bar their claims because damages did not accrue until February 2016 when plaintiffs were unable to sell the property. In any event, plaintiffs were entitled to the benefit of the delayed discovery rule because, based on the short sale agreement with BofA and Chicago Title's title report, they had no reason to suspect the Countrywide Lien was not extinguished. Plaintiffs also asserted

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[2] The relevant statutes of limitations are written contract and declaratory relief (Code of Civ. Proc., § 337, subd. (a) [four years], cancellation of written instrument (Code of Civ. Proc., § 343 [four years]), unfair business practices (Bus. & Prof. Code, § 17208 [four years]), conversion (Code of Civ. Proc., § 338, subd. (c) [three years]) and negligence (Code of Civ. Proc., § 335.1 [two years]).

the action was not barred by res judicata because BofA was not a party to the Woodley action—an action filed by Woodley against Han Realty. Furthermore, no note or lien was the subject of the quiet title action.

7. Hearing, Trial Court Ruling.

The trial court held plaintiffs' action was barred under the longest applicable statute of limitations of four years. The court rejected plaintiffs' contentions they did not discover the Countrywide Lien until February 2016 when they attempted to sell the property. The court ruled "[plaintiffs'] contentions do not establish an 'inability' to have discovered that the subject lien continued to exist, especially because such was always a matter of public record." The court concluded, "[p]laintiffs' arguments as to an inability to have known of the lien are not well-taken in light of the fact that Han Realty, a subsequent transferee of the subject property, is presumed to 'have constructive notice of the contents of [a] recorded document' regarding the subject property." The court denied leave to amend.

DISCUSSION

I. *Standard of Review*

A demurrer tests the sufficiency of the facts pleaded in a complaint. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) We therefore assume the truth of the allegations in the complaint. (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247 (*California Logistics*).) A complaint "is sufficient if it alleges ultimate rather than evidentiary facts." (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550.) But, the plaintiff must set forth the essential facts of his or her case with reasonable precision and with particularity sufficient to acquaint the defendant with the nature, source, and

extent of the plaintiff's claim. (*Ibid.*) In reviewing the complaint, we consider judicially noticed matters, give the complaint a reasonable interpretation, and read it in context. (*Schifando v. City of Los Angeles, supra,* 31 Cal.4th at p. 1081.) The trial court errs in sustaining a demurrer "if the plaintiff has stated a cause of action under any possible legal theory, and it is an abuse of discretion for the court to sustain a demurrer without leave to amend if the plaintiff has shown there is a reasonable possibility a defect can be cured by amendment." (*California Logistics, supra,* 161 Cal.App.4th at p. 247.)

II. *Plaintiffs' Claims Accrued in 2009 When They Had Constructive Notice that BofA Failed to Reconvey the Countrywide Lien.*

A demurrer on statute of limitations grounds may be asserted if the complaint on its face shows a statute of limitations bars the action. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315-1316.)

A cause of action accrues at the time when all of its elements have occurred. (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806.) An exception to the accrual rule is the doctrine of delayed discovery, which postpones accrual until the plaintiff discovers, or has reason to discover, the cause of action. (*Id.* at p. 807.) To invoke the discovery rule, the plaintiffs must act diligently to pursue their claim. Thus, a "plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery, *and* (2) the inability to have made earlier discovery despite reasonable diligence." (*Id.* at p. 808, internal citation omitted, italics in original.) The plaintiff must specifically plead facts showing

diligence. (*Fox v. Ethicon Endo-Surgery, Inc., supra,* 35 Cal.4th at p. 808.)

Here, plaintiffs re-acquired the property from Han after the 2009 short sale through the vehicle of Han Realty. The grantee of property takes subject to existing encumbrances of which the grantee has actual or constructive notice. (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 438; *Hochstein v. Romero* (1990) 219 Cal.App.3d 447, 451.) Thus, the Westleys took the property subject to Han's obligation on the first trust deed as well as the remaining Countrywide Lien.

As a result, the Westleys and Han Realty had constructive notice in 2009 that the Countrywide Lien remained on the property. Every duly recorded conveyance of real property is constructive notice of the contents thereof to subsequent purchasers and mortgagees from the time of recordation. (Civ. Code, § 1213; *In re Marriage of Cloney* (2001) 91 Cal.App.4th 429, 437.) "The law conclusively presumes that a party acquiring property has notice of the contents of a properly recorded document affecting such property." (*Hochstein v. Romero, supra,* 219 Cal.App.3d at pp. 452.) Thus, plaintiffs' constructive notice in July 2009 was more than four years before the commencement of this action in December 2016, and this action is barred by the longest applicable statutes of limitation.

Nonetheless, plaintiffs assert they did not have actual notice of the Countrywide Lien until February 2016 and are excused from the operation of the recording statutes. First, they argue they did not have title until February 2016. Second, since they did not have title, it was irrelevant whether the Countrywide Lien had been extinguished.

Contrary to their assertions, plaintiffs are not entitled to the delayed discovery rule. The delayed discovery rule is based upon principles of actual notice, namely, when did the plaintiff have actual notice of facts alerting them to their claim. (*E-Fab, Inc. v. Accountants, Inc. Services, supra,* 153 Cal.App.4th at p. 1324.) Principles of actual notice do not apply in this context where notice is presumed. Thus, their arguments are without merit. In any event, the Westleys cannot rely on the Chicago Title insurance policy or the Fidelity Escrow to assert they were unaware the Countrywide Lien remained on the property or that the funds were improperly disbursed and thus obtain the benefit of the delayed discovery rule. The Westleys were not a named insured of the Chicago Title policy, and one cannot tell by looking at it whether any liens burdened the property. Nor can they show Chicago Title or Fidelity owed them any duty with respect to notifying them the liens remained on the property. An escrow holder's duties are limited to following escrow instructions. (*Hannon v. Western Title Ins. Co.* (1989) 211 Cal.App.3d 1122, 1128.) An insurer's duty to indemnify first party insureds is limited to those insureds named on the policy. (See *Sprinkles v. Associated Indemnity Corp.* (2010) 188 Cal.App.4th 69, 77.)

For this reason, defendants are not equitably estopped to assert the statute of limitations as a defense. Plaintiffs assert the contrary because BofA never informed them it had not received the $3,000. Further, BofA lulled them into a false sense of security that the Countrywide Lien was extinguished because it refinanced the property when Han acquired it. Additionally, BofA never demanded any further sum from the Westleys. Finally, BofA never mentioned the Countrywide Lien even

though they were involved for years in litigation involving the property.

For its operation, equitable estoppel requires (1) the party to be estopped must know the facts; (2) he must intend his conduct shall be acted upon, or must so act that the party asserting the estoppel had the right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and, (4) he must rely upon the conduct to his injury. (*Hopkins v. Kedzierski* (2014) 225 Cal.App.4th 736, 756.) As we held above, principles of actual notice do not apply when constructive notice controls. As a result, plaintiffs cannot satisfy the third element, namely, they were ignorant of the existence of the Countrywide Lien given they were on constructive notice.

DISPOSITION

The judgment of the superior court is affirmed. Respondents are to recover their costs on appeal.

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CURREY, J.

WE CONCUR:

WILLHITE, Acting P. J.

COLLINS, J.